Supreme Court, U.S.
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No. 90-1933

In The

Supreme Court of the United States

October Term, 1991

JOHNNY W. MOSES, *et ux., et al.*,

Petitioners,

v.

BUSINESS CARD EXPRESS, INC., *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit properly held that the United States Court for the Eastern District of Michigan was not clearly erroneous in granting Summary Judgment in favor of Respondents because the mutually negotiated choice of Michigan law clause contained in the Franchise and License Agreement dictated that Michigan law governed claims relating to alleged fraud and misrepresentation in connection with Petitioners' execution of such Agreement.

2. Whether this Court can review a decision issued by the United States District Court for the Northern District of Alabama.

3. Whether the United States Court of Appeals for the Sixth Circuit properly affirmed the application of the law of the case doctrine by the United States District Court for the Eastern District of Michigan in denying Petitioners' motion to re-transfer this case back to the United States District Court for the Northern District of Alabama, which previously transferred the case, pursuant to 28 U.S.C. § 1404(a).

LIST OF PARTIES

The parties before the Court and to the proceedings below before the United States Court of Appeals for the Sixth Circuit are respondents Business Card Express, Inc., Gregory Derry, Dennis Phillips, American Speedy Printing Centers, Inc. and Andrew Petress and petitioners Johnny W. Moses, Frances G. Moses and J & F Enterprises, Inc.

The corporate respondents state that they have no parent companies or subsidiaries to list pursuant to Rule 29.1.

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28 U.S.C. § 1404(a) 5, 6, 7

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

The essence of this case revolves around Petitioners' attempt to avoid the application of mutually negotiated choice of law and choice of forum clauses in the Franchise and License Agreement ("Agreement") between Respondents and Petitioners, which state:

> This Franchise and License Agreement and the construction thereof shall be governed by the laws of the State of Michigan. . . . Both parties acknowledge all litigation must be commenced in the Federal District Court of the Eastern District of Michigan or the Michigan Circuit Court for the County of Oakland.

Respondents adopt the statement of the case contained in Sections I and II of the Opinion.[1]

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The outcome of this case rested solely on the trial court's construction of a particular contractual choice of law clause and, consequently, a decision by this Court would have extremely limited, if any, precedential authority in future cases construing the virtually infinite variations in these clauses. The Petition also inappropriately requests this Court to review the decision of a district court, which is outside of the Sixth Circuit, and clearly outside of the jurisdictional powers of

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[1] Respondents further wish to point out to the Court a misstatement of fact contained in the statement of the case in the Petition. Petitioners assert that on July 12, 1989, when the Northern District of Alabama held that it lacked jurisdiction to decide Plaintiffs' Motion for Reconsideration of the order transferring this case to the Eastern District of Michigan because the files had already been transferred, that the Northern District of Alabama was wrong because the files were "still in the custody of the Alabama District Court Clerk." (Pet. at 7.) Petitioners base this assertion on a docket entry in the Eastern District of Michigan recorded on July 17, 1989 (R. 48) showing a notice of transfer by the Clerk for the Northern District of Alabama. (*See* Reply Brief of Appellants in the Sixth Circuit at 5). The date that the clerk for the Eastern District of Michigan recorded the notice of transfer does not *prove* that the files were not transferred on or before July 12, 1989, as Judge Acker stated. More likely, it merely reflects the time it took for shipment from Alabama to Michigan (which included two weekend days).

this Court, and incorrectly asserts that the transfer order was not reviewed by any court. Accordingly, further review is not warranted.

ARGUMENT

1. Choice of Law Clause. The pivotal issue in this Petition is the choice of law clause. As the panel observed, and petitioners do not dispute:

> We must recognize from the outset that the resolution of this [choice of forum] issue should not be outcome determinative because of the presence of the choice of law clause. That clause states that the Agreement itself as well as its construction "shall be governed by the laws of the State of Michigan." In a diversity action such as this, the courts of Alabama and Michigan, applying Michigan law under the governing law clause, should reach identical results on the substantive issues involved in the case. Cf. *Guaranty Trust Co. v. York*, 326 U.S. 99, 100 (1945); *Stewart Organization, Inc. v. Ricoh, supra*, 810 F.2d at 1070.

(Pet. App. 18a-19a). Thus, even if issues regarding the transfer of this case pursuant to the choice of forum clause discussed below would be alone worthy of certiorari (and Respondents contend that they are not), the presence of the choice of law clause here *a priori* limits this case to the construction of a simple clause in a contract.

The Decision regarding the effect and construction of the choice of law clause was correct and not in conflict with the Fifth Circuit, as Petitioners attempt to argue.

Petitioners seek to have this Court read the choice of law clause, which states "this Franchise and License Agreement *and the Construction thereof* shall be governed by the laws of the State of Michigan . . . ," in a narrow and gerrymandered fashion to "create" a conflict with the Fifth Circuit's decision in *Caton v. Leach Corp.*, 869 F.2d 939 (5th Cir. 1990). In *Caton*, the court held that a choice of law clause stating "[t]his Agreement shall be *construed* under the laws of the State of California" covered only claims which required the *construction* of a contract. *Id.* at 942-43 (emphasis added). The court held that the clause covered claims for breach of contract and for an implied contractual covenant of good faith, and excluded claims for the tort duty of good faith and fair dealing and for restitution under a *quantum meruit* theory, which, the court stated, "[d]id not arise out of a contract." *Id.*

Petitioners erroneously contend that the clause at issue here is "virtually indistinguishable" from the clause at issue in *Caton* (Pet. at 20-21), and would have the clause apply *only* to claims requiring construction of the Franchise and License Agreement. Petitioners clearly ignore the plain wording of the clause. As the Sixth Circuit observed:

> [T]he clause refers to more than construction of the Agreement; otherwise the first six words would be surplusage. If the clause provided merely that the construction would be governed by the law of Michigan, the Plaintiffs would have more support for their argument that it does not apply more generally.

(Pet. App. at 37a-38a). Petitioners' fraud, deceit and misrepresentation claims clearly relate to the "Agreement", even though they may not require *construction* of the

Agreement. Indeed, as the Sixth Circuit observed, Petitioners

> are not asserting a non-contractual claim or one that arose incidentally out of a contractual relationship. Rather, they are seeking to avoid the enforcement of the contract itself. They put the validity of the contract in issue, and such a claim would appear to be encompassed by the language [of the clause]. . . .

(Pet. App. at 39a).[2] Because the Petition ignores the clear wording of the choice of law clause and fails to show any conflict among the courts of appeals interpreting such clauses, and because all courts addressing similar clauses agree with the decision below, the Petition should be denied.[3]

2. Choice of Forum Clause. Petitioners curiously posit most of their argument on the choice of forum clause in the Agreement and the resulting transfer of the case by the Northern District of Alabama to the Eastern District of Michigan, pursuant to 28 U.S.C. § 1404(a).

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[2] *See also Overseas Trading Co. v. United States*, 159 F.Supp. 382, 384 (Ct.Cl.1958) (clause stating that contract is "governed by and construed in accordance with" D.C. law held to cover extra-contractual claims because the phrase "governed by" is "extremely broad in scope"); *Economu v. Borg Warner Corp.*, 652 F.Supp. 1242, 1249 (D.Conn.1987), *aff'd*, 829 F.2d 311 (2d Cir. 1987) (same regarding arbitration clause); *S.A. Mimeracao v. Utah International, Inc.*, 576 F.Supp. 566, 570-573 (S.D.N.Y. 1983), *aff'd*, 745 F.2d 190 (2d Cir. 1984) (same).

[3] Petitioners do not seek certiorari regarding the parties' mutual ability to agree to apply Michigan law or the validity of the choice of law clause itself.

Even if meritorious, issues surrounding the proper application of § 1404(a) to choice of forum clauses are not properly presented here because, as a result of the choice of law clause mandating Michigan law, the outcome in this case would have been the same regardless of the forum. Additionally, Petitioners' arguments are without merit.

First, Petitioners apparently seek to have this Court review the transfer order of the Northern District of Alabama. (Pet. at i-ii, 9-11; Pet. App. 41A-66A). Such review is obviously beyond the jurisdiction of this Court.

Petitioners' next argument is that they were essentially denied the opportunity to have the decision of the Northern District of Alabama reviewed by any court, including the Eleventh Circuit, Eastern District of Michigan or Sixth Circuit. (Pet. at 11-15). This argument is both incorrect and disingenuous. First, Petitioners gave up an opportunity to seek reconsideration by the Northern District of Alabama or review by the Eleventh Circuit because they did not seek a writ of mandamus from the Eleventh Circuit to preserve its jurisdiction by compelling the Clerk for the Northern District of Alabama to request that the files of the case be returned from the Eastern District of Michigan so that the Northern District of Alabama would retain jurisdiction to reconsider the transfer. *See Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 989 n.10 (11th Cir. 1982). Second, contrary to Petitioner's assertions that it has been left in "a judicial limbo" (Pet. at 15), both the Eastern District of Michigan and the Sixth Circuit examined the transfer order of the Northern District of Alabama, guided by "the law of the case" doctrine, under which courts should

refrain from revisiting decisions of a coordinate court, except where the "initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus., Inc.*, 486 U.S. 800, 817 (1988) (law of the case doctrine applies "with even greater force to transfer decisions than to decisions of substantive law").[4] The Eastern District of Michigan held, after reviewing this Court's decision in *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), and the related mandamus to the Eleventh Circuit, *In re Ricoh Corp.*, 870 F.2d 570 (11th Cir. 1989), that the Northern District of Alabama's discretionary transfer order pursuant to § 1404(a) was not clearly erroneous. Further, the Eastern District of Michigan considered new arguments, raised only *after* the transfer, and similarly held such arguments did not justify overriding the transfer dictated by the choice of forum clause.[5]

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[4] *See also, Arizona v. California*, 460 U.S. 605, 618 (1983).

[5] Petitioner's discussion of a conflict among the circuits regarding the power of a transferee court to review the decision of a transferor court (which, in fact, is not a true conflict, *see Roofing & Sheet Metal*, 689 F.2d at 987) is spurious. This Court has, in *Christianson*, set forth the standard by which courts in different jurisdictions may revisit transfer orders, *see* 486 U.S. at 816-17 and n.5., and the Eastern District of Michigan and the Sixth Circuit applied this standard in ruling upon Petitioner's Motion for Re-Transfer back to the Northern District of Alabama. The decision by the Eastern District of Michigan that it could not consider Petitioners' Motion for Reconsideration of the transfer thus had no practical impact because the transfer was properly examined through the consideration of Petitioners' Motion for Re-Transfer, which was simply a re-cast version of the Motion for Reconsideration. *See Roofing & Sheet Metal*, 689 F.2d at 989 ("a motion for re-transfer is an appropriate means of preserving for appeal any objection to a transfer between circuits").

This Court need not again review the validity of transfers dictated by choice of forum clauses. In a decision announced this year, *Carnival Cruise Lines, Inc. v. Shute*, ___ U.S. ___, 111 S.Ct. 1522 (1991), this Court thoroughly reviewed the validity of such clauses and came out strongly in favor of enforcing them. This case adds nothing fundamentally new to the rationale employed in *Carnival Cruise Lines*. Additionally this case suffers from numerous infirmities which render it unworthy of certiorari, including Petitioners' failure to seek mandamus from the Eleventh Circuit, the added presence of the salutatory policies of the law of the case doctrine to prevent Petitioners from playing forum "ping-pong", and, most importantly, the presence of the choice of law clause which would render any ruling on the transfer meaningless.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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